No. 13,095

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

-vs-

B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY, a Montana Corporation, JOHN A. HAZEL, THEODORE KNUTSON and EDNA I. KNUTSON, his wife, P. W. SORENSON, AVERY A. STEVENS, MEIL C. PIERCE, BERT LISH, BERT MYERS NELSON, JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON, JOHN MINESINGER and ADA B. MINESINGER, his wife, and THOMAS WALD,

Appellees,

and

FLATHEAD IRRIGATION DISTRICT, a corporation, and DENNIS A. DELLWO,

Appellants,

-vs-

B. W. ALEXANDER et al,

Appellees.

Petition of Appellants, Flathead Irrigation District and Dennis A. Dellwo for Rehearing

POPE & SMITH,
WALTER L. POPE,
RUSSELL E. SMITH,
Attorneys for said Appellants,
Flathead Irrigation District
and Dennis A. Dellwo.

MISSOULIAN

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TO THE HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND TO THE JUDGES THEREOF:

Come now Flathead Irrigation District, a corporation, and Dennis A. Dellwo, appellants above-named, and present this their Petition for Rehearing of the above entitled cause, and in support thereof respectfully show:

1. *The decision of the court has overlooked the fact that the findings and the evidence disclose that appellees are using water in excess of "so much water as may be required to irrigate such lands."*

In rejecting the government's claim, the opinion of the court states: (P. 4)

> "Before it would be entitled to an injunction, it must show that appellees have wrongfully diverted water. No violation of the Act of April 23, 1904, as amended by the Act of May 29, 1908 is shown, since there is no claim that appellees used an amount of water in excess of 'so much water as may be required to irrigate such lands'."

It is respectfully submitted that the court has overlooked the fact that the lower court made findings, based on uncontradicted evidence, which disclose that the appellees are in fact using such excess quantities of water. The court made specific findings as to the amounts of water "required to irrigate such lands." By Finding 64 (R. 166) the court found that the lands of appellees under the McDonald-Deschamps ditch required two and one-half acre feet per acre per annum. By Finding 65 (R. 167) the court found that the lands of the appellees under the Magee-Minesinger ditch required two acre feet of water per acre

per annum. These findings were based upon testimony directed to that end. (R. 231).

By Finding 66 (R. 167) the court found the amounts of water used by appellees through the McDonald-Deschamps ditch for the years 1935 to 1938, inclusive. This showed for 1938 the use of 1490.32 acre feet of water. By Finding 67 (R. 167) the court found the amounts of water taken by the appellees through the Magee-Minesinger ditch for the years 1935-1938 inclusive. This showed a use by them in 1938 of 2558.16 acre feet of water. (R. 168)

The quantities last mentioned were taken by the court from the testimony of C. H. Dexter, pages 339-343 of the record, and these figures were arrived at by actual gauge readings. (R. 339)

Finding 63 (R. 165) contains the court's findings as to the irrigable acreage on the tracts involved, and from this it appears that the acreage of the appellees under the McDonald-Deschamps ditch was 525 acres, and that under the Magee-Minesinger ditch 317.6 acres.

Thus it appears that in the year 1938 the appellees under the Magee-Minesinger ditch, not confining themselves to the two acre feet per annum which the court found to be the amount required to produce crops to the full extent of the soil on such lands, actually used more than four times that amount, or 8.05 acre feet per acre. In the same year the appellees under the McDonald-Deschamps ditch, not confining themselves to the two and one-half acre feet per annum required to produce crops to the full extent of the soil on those lands, used 2.83 acre feet.

It thus plainly appears that even applying the standard

or test set up by the opinion of this court, excessive quantities were diverted. The opinion of the court has overlooked these facts.

2. *The decision of the court has overlooked and omitted consideration of the language of the Act of May 29, 1908 (35 Stat. 448) which expressly excludes appellees from its provisions.*

It is respectfully submitted that the court has overlooked the fact that the lands of the appellees are not lands irrigable under the Flathead Irrigation System, referred to and described in the Act of May 29, 1908 (35 Stat. 448). The lands of the appellees form no part of the Flathead Irrigation System. They are not subject to the payment of operation, maintenance or construction assessments to the United States either under the Act of May 29, 1908, or the Act of May 18, 1916 (39 Stat. 139). Nor do their lands form any part of an irrigation district organized to contract with the United States pursuant to the Act of May 11, 1926 (44 Stat. 464). The lands of the appellees are irrigated by ditches constructed by appellees or their predecessors.

The Act of May 29, 1908 was enacted for the purpose of outlining the methods and times of payment for water rights under the irrigation system for which the United States had begun making appropriations. See Act of April 30, 1908 (35 Stat. 83). And so the portion of the act upon which this part of the court's opinion places so much emphasis reads as follows:

> "*The land irrigable under the systems herein provided*, which has been allotted to Indians in severalty, shall be deemed to have a right," etc. (Italics supplied).

The Act does not leave in doubt what is meant by "the systems herein provided." The first reference to them is in the following words of the Act:

> "That the entryman or owner of any land irrigable by any system hereunder constructed under the provisions of section fourteen of this act, shall," etc.

Section fourteen, as amended by the same Act of May 29, 1908, provides:

> "That the proceeds received from the sale of said lands *** shall be expended as follows: So much thereof as the Secretary of the Interior may deem advisable in the construction of irrigation systems, for the irrigation of the irrigable lands embraced within the limits of said reservation;"

In other words, the "systems herein provided" are systems constructed by the United States. This is the Flathead Irrigation Project, as constructed by the government. Appellees' lands are served by no such system.

Since the lands of the appellees are not lands "irrigable under the systems herein provided," the appellees are not entitled to any water by virtue of that legislative enactment. They do not come within its terms.

If the rights of appellees are dependent upon the Act of May 29, 1908, appellees would be entitled to nothing.[1]

3. *All the legislation referring to the Flathead Irrigation Project discloses that Congress intended all users thereunder to have equal rights.*

Several of the acts of Congress relating to the Flathead Irrigation Project are in part quoted in the appendix to

Footnote 1. It should not be understood that interveners claim that appellees have no rights. Their right to a pro rata share is conceded in our original brief. What we have here pointed out is the fallacy of basing their rights on the language quoted by the court from the Act of May 29, 1908.

these appellants' original brief. The Act of May 29, 1908 (35 Stat. 448) when read in its entirety furnishes a clear demonstration that all lands under the system were expected to have equal water rights. By this Act the entryman was "required to pay for a water right the proportionate cost of the construction of said system." The entryman of lands "to be irrigated by said system" was required to reclaim at least "one-half of the total irrigable area of his entry." The use of water on such lands was limited to tracts not exceeding 160 acres to any one person and "all applicants for water rights under the systems constructed in pursuance of this act" were required to pay annual charges for operation and maintenance, failing which the water right and the entry were subject to cancellation. When the payments required by the act had been made for the major part of the unallotted lands, the management and operation of the works would pass to the "owners of the lands irrigated thereby." The Act also provided for "the construction of irrigation systems, for the irrigation of *the irrigable lands embraced within the limits of said reservation.*" (Italics supplied).

It will thus be noted that the Act of May 29, 1908, clearly contemplated that the entryman who, under the Act, was a purchaser of unallotted lands, and who was required to pay the Indian price therefor, was to have a water right under the systems. The Act draws no distinction between the water rights for allotted and unallotted lands under the system, with the exception that the Indian allottee was not required to pay construction costs since tribal funds were

then being used for that purpose. (See Section 14 of the Act of April 23, 1904, as amended by the Act of May 29, 1908). It would be absurd to suppose that the water right in connection with which the purchaser of unallotted lands was required to reclaim half of his irrigable area would be anything other than a water right equivalent, so far as priority is concerned, to the water rights of every other user under the system.

The Act of May 18, 1916 (39 Stat. 139) went still further in undertaking to provide substantial equality among all water users. This legislation was adopted pursuant to the report contained in House Document No. 1215, 63rd. Congress, Third Session, House Documents Vol. 103, page 33, in consequence of which the tribal funds previously used for construction were restored to the tribe. This Act prescribed that "the allottee, entryman, purchaser or owner of such irrigable land" should pay the the United States construction charges in stated installments. The act provided that "such charges shall be assessed against the land irrigable by the systems on each said reservation in the proportion of the total construction costs which each acre of such land bears to the whole area of irrigable land thereunder." Certainly this language cannot be reconciled with an assumption of a congressional intention that the water rights under the systems be treated as unequal.

Again, the Act of May 11, 1926 (44 Stat. 464) calling for the creation of irrigation districts and repayment contracts, made it clear that all landowners were to be treated alike. Thus, ~~in speaking of~~ trust patent Indian lands,

which were to remain outside the districts until fee patent had been issued, were treated of in the following language:

> "That trust patent Indian lands shall not be subject to the provisions of the law of any district created as herein provided for but shall, upon the issuance of fee patent therefor, be accorded the *same rights and privileges and be subject to the same obligations as other lands within such district or districts.*" (Italics supplied).

All of the appropriation acts of Congress mention allotted and unallotted lands in the same breath. The Act of April 30, 1908 (35 Stat. 83), appropriated for the irrigation of the "allotted lands of the Indians of the Flathead Reservation in Montana and the unallotted lands to be disposed of under the Act of April twenty-third, nineteen hundred and four." For a list of similar acts see our original brief, page 40.

4. *The decision overlooks the rule that the United States, as owner of the Flathead Irrigation Project, and as trustee for the Indian and white users thereunder may enter the courts to protect its and their rights, and that the adoption of rules and regulations is not a prerequisite to the institution of such a suit.*

By the legislation in question Congress has provided for the construction of an irrigation system, title to which is in the United States. The United States, through the Department of the Interior, administers that system and divides and distributes the water. As owner and operator of the system the United States has found that the appellees have taken, and are taking, excessive quantities of water for which the lands irrigable under the systems have need. The claim of the government is that these appellees are not

only trespassers, but are continuing and repeated trespassers. The situation is therefore not different than that discussed by Judge Wolverton in his opinion in *United States* v. *Conrad Investment Co.*, 156 Fed. 124, which decision was affirmed by this court in 161 Fed. 829. Judge Wolverton, speaking at page 132, said:

> "Another question presented is whether complainant can maintain this proceeding without at the same time making all other appropriators and users of water from the same stream parties to the suit, that the correlative rights of all of the parties to the use of such water may be settled and adjusted. I am of the opinion that it can. *Any invasion of the government's right to the use of the water from said stream would give it cause for suit, and this would be so whether the shortage to the government was caused by one or several parties.* All would be trespassers, and the government could sue some or all jointly, or any one of them severally, as it might feel disposed." (Italics supplied).

See also *Vineyard Land & Stock Co.* v. *Twin Falls Oakley Land & Water Co.*, 245 Fed. 30, at page 35.

This is unquestionably a suit to enjoin trespassers. There is therefore no defect of parties defendant.

The right of the United States itself, as owner and operator of an irrigation system to enjoin threatened interferences and trespasses has always been taken for granted, and in fact has never been questioned. For an illustration of a suit of that kind see *Ide* v. *United States*, 263 U. S. 497, where the United States sued to enjoin interference with work which it was doing in connection with an irrigation project, and in which the government's rights to certain specific water had been drawn in question.

The assumption in the opinion of the court that the United States may not maintain this suit to establish its contentions that the appellees are in fact taking excessive quantities of water and are therefore trespassers, without first adopting rules and regulations, finds no support in the decisions of the Supreme Court of the United States. Thus in *Cotton* v. *United States,* 52 U. S. 229, 11 How. 229, the United States brought an action of trespass against Cotton, who was charged with cutting and carrying away certain timber from government lands. Cotton contended that the only remedy of the United States was by indictment, and that the United States had no common law remedy for private wrongs. The court said:

> "It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. The restraints of the constitution upon their sovereign powers cannot affect their civil rights. Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property, in the state courts, or in their own tribunals administering the same laws. As an owner of property in almost every State of the Union, they have the same right to have it protected by the local laws that other persons have. As was said by this court in Dugan v. United States, 3 Wheat, 181: 'It would be strange to deny them a right which is secured to every citizen of the United States'."

The case just cited was quoted with approval by this court in *Merryweather* v. *United States,* 12 Fed. (2d) 407, at page 410. In accord see *In Re Debs,* 158 U. S. 564, 15 S. Ct. 900, 39 L. Ed. 1092, and *New York* v. *New Jersey,* 256 U. S. 296, 65 L. Ed. 937, 41 S. Ct. 492.

Neither in *Ide* v. *United States,* cited above, nor in any of the cases last cited was there intimation that the executive officers of the United States, or the United States Attorney, must secure the adoption of rules and regulations as a prerequisite to the institution of a suit to enjoin a trespass.

There is a further reason why the adoption of rules and regulations here is not a prerequisite to a determination of the government's claim. As pointed out above, Congress, in setting up the Flathead Irrigation Project and the systems comprehended therein, has established a system for equal water rights. As we have indicated, no distinction has been drawn between allotted and unallotted lands. It is difficult to understand how rules and regulations reciting the same principle of equality or directing a pro rata distribution would add anything to what Congress, as well as this court in the *McIntire* and *Powers* cases, have already prescribed.

And in instituting this suit the United States has obviously acted in a representative and trust capacity. It acts for itself as owner and administrator of the system, and for the land owners within it and served by it. If it were necessary to do so, we might here invoke the provisions of Rule 23 of the Federal Rules of Civil Procedure, but the principles applicable to such representative suits are too elementary to require that.

This being so, it is difficult to see how there can be a want of necessary parties. As for the users under the system, they are represented by the government. As for the appellees, they cannot object that other defendants should

be joined for the reasons stated by Judge Wolverton in the language we have quoted above. As we shall point out shortly, the defendants are trespassers and wrongdoers without regard to whether unallotted lands are or are not computed in determining how the water should be distributed. But surely the United States should be permitted not only to ask for an injunction, but to ask for an injunction the terms and extent of which will protect all users under the project systems. The question of how many of these users may be considered in defining the rights of the government is merely a question incidental to the securing of an injunction,—incidental because it relates to the extent and terms of the injunction.

5. *The decision overlooks the fact that the findings and evidence disclose that, wholly apart from a consideration of unallotted lands, and considering allotted lands only, defendants are using excessive quantities of water.*

As previously indicated, the government and the interveners might have contended that if the rights of the defendants must be sought in the provisions of the Act of May 29, 1908, then they have no rights and should be denied all water. The government and the interveners have taken the position that the defendants are entitled to not to exceed a pro rata share of the normal flow of the Flathead streams. (Clearly, they have no basis for any claim to any stored or pumped water developed with government funds not chargeable to or made reimbursable from the lands of the appellees and distributed and operated by a system to which appellees make no contribution for operation or maintenance.) The uncontradicted evidence in the record

discloses that the appellees have been taking quantities of water in excess of a pro rata share even if only allotted lands were taken into consideration. (See Ex. 19, R. 401).

The opinion of the court would seem to indicate that the court has overlooked this fact, for the court, in the last paragraph on page 4 of the opinion, seems to assume that an insufficiency of the water supply would not occur unless unallotted lands were considered in the total quantity entitled to water.

The lower court's Finding No. 100 (R. 185), which is quoted in the opinion, is not contrary to our assertion. By that finding the court found that "the natural flow of water is ** not sufficient to irrigate the irrigable area of all of the Indian allotments."

The lower court's Finding No. 98 (R. 185) is even more specific, the court there finding that "the amount of water available in acre feet per acre on the Mission Valley Division ** is not sufficient to produce crops to the full extent of the soil thereof if only Indian allotments ** are considered."

The finding in the last part of Finding No. 100 to the effect that the Indian allotments could be irrigated if stored water were used and added to the natural flow is beside the point, for the appellees in this case are not entitled to claim an interest in such stored waters, nor to have the same computed in determining the extent of their rights. It therefore plainly appears that the government has taken a sound and reasonable attitude toward the appellees in assuming their right to a pro rata participation in the waters naturally flowing in the reservation streams, yet such pro

rata participation would be the extreme limit of any right which the appellees might claim, and measured by that standard the appellees are shown to have exceeded such pro rata share, and whether unallotted lands be considered or not the government is clearly entitled to an injunction against them.

6. *The regulations promulgated by the Secretary, appointing the Project Manager a water master to distribute waters, and requiring headgates in ditches, is valid if authorized by any legislation.*

These regulations are referred to in a footnote to the opinion. They are apparently held ineffective because "they appear to be rules promulgated under the amendment of 1908 to Sec. 9."

The Act of May 29, 1908 authorized the making of rules and regulations. So did the Act of May 18, 1916. So did the General Allotment Act. And since all these acts are of equal dignity, it is believed the court has overlooked the principle, well stated in Klutts v. Jones (N. M.), 148 Pac. 494, that administrative action will be sustained if within any legislative authority.

The record shows at length the injurious effect of the refusal of appellees to conform to such regulations. (See our original brief, p. 15, for a review of this evidence.) To accord interveners the relief prayed in paragraph IV of their prayer (R. 80), which is based on these regulations, would involve no problem of additional parties, and it is believed this relief should have been recognized and granted.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be grant-

ed and that the judgment of the District Court be upon further consideration reversed.

Respectfully submitted,

POPE & SMITH

WALTER L. POPE

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Attorneys for said Appellants,
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and Dennis A. Dellwo.

CERTIFICATE OF COUNSEL

I, counsel for the above named appellants, Flathead Irrigation District and Dennis A. Dellwo, do hereby certify that in my judgment the foregoing Petition for Rehearing is well founded, and I further certify that said petition is not interposed for delay.

WALTER L. POPE,

Counsel for said Appellants.